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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 387

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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No.

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in *Pan American Petroleum Corp. v. FPC*, Case No. 7002, on May 20, 1963.

OPINION BELOW

The opinion of the Court of Appeals is printed in the Appendix hereto, pp. 1a-18a, and is reported in 317 F. 2d 796. The portion of the decision below to which this petition pertains, Case No. 7002 in the Court of Appeals, is at pp. 8a-10a in the Appendix, and reported in 317 F. 2d 802-803.

JURISDICTION

The judgment of the Court of Appeals was made and entered on May 20, 1963. The jurisdiction of this Court is invoked

under 28 U.S.C. Section 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). The jurisdiction of the Court of Appeals under Section 19(b) of the Natural Gas Act to review Federal Power Commission substantive regulations is the issue in this case.

QUESTION PRESENTED

By its rulemaking "general" Order No. 242 the Federal Power Commission requires its Secretary to *reject* and *disallow* without a hearing producer rate filings under Section 4(c) and (d) of the Natural Gas Act and certificate applications under Section 7(c) of the Act which are supported by sales contracts containing flexible price changing clauses.

It is well settled that orders which *reject* rate filings under Sections 4(c) and (d) of the Act or which *disallow* rates after hearing and findings under Section 4(e) or 5(a) of the Act are substantive orders reviewable under Section 19(b) of the Act. Similarly, orders issued upon hearing and findings under Sections 7(c) and (e) of the Act which deny or condition certificates are substantive orders reviewable under Section 19(b) of the Act. These orders are reviewable in *direct* review upon the record made in the proceedings in which they were issued.

However, the Court of Appeals held that, because Order No. 242 is in the *form* of a substantive regulation, it is an exception to this well settled rule and not *directly* reviewable upon the record made in the proceeding in which it was issued. The question here presented is:

> Whether final and controlling substantive rate and certificate adjudications and decisions are reviewable under Section 19(b) of the Act on direct appeal in the proceeding in which they are made, where, as is the case with Order No. 242, such final decisions are in the form of rulemaking orders directed to Petitioner as a member of the class, regulated independent producers, rather than in the

form of "special" orders directed to Petitioner singly or as a member of a large group of individually named producers.

STATUTES INVOLVED

The statutory provisions involved are Sections 4(c), (d) and (e), 5(a), 7(c) and (e) and 19(b) of the Natural Gas Act, 52 Stat. 822 and 823 (1938), 56 Stat. 83-84 (1942), and 52 Stat. 831 (1938), 15 U.S.C. 717c(c), (d) and (e), 717d(a), 717f(c) and (e), and 717r(b). They are set out in the Appendix, pp. 19a-24a.

STATEMENT

This case presents for review the basic question: Whether the "substantive effect test" of aggrievement and reviewability applied by this Court to determine reviewability of agency regulations is a rule of general applicability that is applicable to judicial review under Section 19(b) of the Natural Gas Act. As a result of its misinterpretation and erroneously restrictive application of the reviewability doctrine of *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954), and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), the Court of Appeals held that the "substantive effect tests" of parties aggrieved and reviewability of orders that was applied in these cases is not applicable to judicial review under Section 19(b) of the Natural Gas Act. The result is that aggrievement, and therefore Section 19(b) reviewability, are governed by the technical *form of orders* rather than the *substantive effect of Commission decisions*. This case thus presents an issue respecting uniform interpretation of the aggrievement requirement for judicial review and a basic question respecting the administration of the Natural Gas Act that is unresolved by this Court.

[1] "The particular label placed upon [its action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942).

The subject matter of jurisdiction under Section 19(b) of the Act in this case is *Order No. 242*, 27 F.R. 1356, 27 FPC 339, February 8, 1962 (R. 277-279; J.A. 52-56, App. 28a-31a), amending *Order No. 232-A*, 26 F.R. 2850, 25 FPC 609, March 31, 1961, which amended *Order No. 232*, 26 F.R. 1983, 25 FPC 379, March 3, 1962. Order No. 242 requires rejection of rate filings without a hearing, adjudication or findings showing whether the rates are just and reasonable, and rejection of certificate applications without a hearing, adjudication and findings of public convenience and necessity, where the sales contract contains a flexible price changing clause. This series of orders summarily invalidates the flexible price changing provisions in Petitioner's sales contracts, such as provisions that, at the end of the twentieth year of gas deliveries, the parties will redetermine the contract price to reflect the then current market price, which provisions the Commission designates as "indefinite" price changing provisions.[2]

Under doctrine of *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), orders which deprive Petitioner of its contractual right to file rates and require rejection of rate filings have the same substantive effect as orders disallowing rates after hearing under Section 4(e) or 5(a) of the Act. In these cases the Court held that the two requirements of gas seller initiated rate changes are (1) a contractual right to the rate change and (2) filing under Section 4(d) of the Act a notice of the rate change.

[2] See *Pan American Petroleum Corp. v. FPC*, Case No. 7303, 10th Circuit (App. 1a-18a). Other invalidated contract provisions are price renegotiation provisions, market price provisions and favored-nation provisions. These flexible price changing provisions are designated "indefinite" price changing provisions in Commission orders and in the opinion below. They allow price flexibility under long-term contracts by allowing Petitioner to change its contract prices to reflect current market conditions and prices. Throughout this petition, Petitioner refers to these clauses as flexible price changing provisions.

The proceedings which ultimately resulted in Order No. 232 were instituted by notice issued April 4, 1956, in Docket No. R-153, proposing issuance of regulations requiring summary rejection of initial rate schedule filings supported by producer gas sales contracts containing flexible change in price provisions. Petitioner, then Stanolind Oil and Gas Company, filed its May 24, 1956, letter opposing the proposed rule. There were no further proceedings until March 3, 1961, when the Commission issued Order No. 232 (25 FPC 379) determining that flexible change in price provisions in all independent producer contracts *tendered for filing* on and after April 3, 1961, are *inoperative* and of *no effect at law*. On March 20, 1961, Petitioner filed its views and comments in opposition to Order No. 232, and on March 28, 1961, it filed its application for rehearing. By Order No. 232-A (25 FPC 609) issued March 31, 1961, the Commission amended Order No. 232 to make it applicable only to producer contracts *executed* on or after April 3, 1961. On April 26, 1961, Petitioner filed its application for rehearing on Order No. 232-A. By Letter Orders issued May 4, 1961, and May 5, 1961, the Commission rejected Petitioner's applications for rehearing on the ground that "application for rehearing [upon these orders] does not lie under Section 19 of the Natural Gas Act."

Thereafter, by Notice of Proposed Rulemaking, issued October 10, 1961, in Docket No. R-203 (R. 1-3, J.A. 26-28), the Commission proposed amending Order No. 232-A to require summary *rejection of producer rate schedules and certificate applications* which are supported by contracts containing flexible change in price provisions. In its views and comments, Petitioner maintained that the proposed amendatory order would be even more unlawful and in excess of the Commission's authority than Order No. 232, as amended by Order No. 232-A[3] (R. 12-66).

On February 8, 1962, the Commission issued Order No.

[3] Extensive views and comments were filed by local gas distributing companies, interstate pipe line companies, state public service commissions and independent producers (R. 4-250).

242 (R. 277-279, J.A. 52-56, App. 28a-31a) which (1) requires *rejection of all producer rate schedules and applications for certificates of public convenience and necessity* which are supported by contracts executed on or after April 2, 1962, that contain flexible change in price provisions and (2) provides that, with respect to pipeline certificate applications, *such contracts will not be considered in support of the pipeline company's gas supply*. Thereafter, on March 7, 1962, Petitioner filed its application for rehearing (R. 290-318, J.A. 56-85), and on April 1, 1962, its application for rehearing was denied (R. 388-389, J.A. 109-111). On April 19, 1962, Petitioner filed its petition for judicial review of Order No. 242 (J.A. 2-15). The Commission moved to dismiss asserting that Order No. 242 is not *directly* reviewable, regardless of whether it is procedural or substantive in effect, and regardless of the substantive sanctions imposed upon Petitioner thereby, and regardless of the substantive rate and certificate adjudications and decisions embodied therein.

The local issue was Court of Appeals jurisdiction under the first sentence of Section 19(b) of the Act: "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States . . . by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part." Petitioner maintained that Order No. 242 is *directly* reviewable *because of what it does*. The Commission maintained that Order No. 242 is not directly reviewable *because of what its form is*.

In support of its argument that Section 19(b) of the Act provides that all decisions fixing substantive rights are *directly* reviewable regardless of whether issued in the *form* of general regulations or specific orders, Petitioner relied on the broad doctrine applied by this Court in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942), *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954), *Frozen Food Express v.*

United States, 351 U.S. 40 (1956) and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), to determine whether the substantive general regulations before it were *directly* reviewable.[4] Petitioner argued that the reviewability doctrines applied by this Court in these cases are applicable to Section 19(b) of the Act with the result that the label and technical *form* of Order No. 242 is irrelevant, but that reviewability is determined by its practical *substantive effect*. cf. "The particular label placed upon [its action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States*, supra.

The Commission argued that because it is in the *form* of a regulation, Order No. 242 is not *directly* reviewable under Section 19(b) of the Act even if it constitutes final substantive adjudication, that aggrieves Petitioner. It sought to distinguish Order No. 242 from substantive orders which it admits are reviewable in that Order No. 242 is in the *form* of a regulation directed to Petitioner as a member of the whole body of regulated independent producers rather than in the *form* of a special order directed to Petitioner in its corporate name. It relied principally upon *United Gas Pipe Line Co. v. FPC*, 181 F. 2d 796

[4] In these cases, the Court reviewed general regulations and policy statements issued by the Federal Communications Commission and the Interstate Commerce Commission. The *Columbia Broadcasting* case was brought in the District Court under 47 U.S.C. § 402(a) and 28 U.S.C. § 47. The *American Broadcasting* case was brought in the District Court under 47 U.S.C. § 402(a), 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, and 5 U.S.C. § 1009. The *Frozen Food* case was brought in the District Court under 49 U.S.C. § 305(g), 28 U.S.C. §§ 1336, 1398 and 2321-2325, and 5 U.S.C. § 1009. The *Storer Broadcasting* case was brought in the Court of Appeals under 47 U.S.C. § 402(a), 5 U.S.C. §§ 1009 and 1034. Petitioner also relied on Court of Appeals decisions under Section 19(b) of the Act sustaining review of substantive Commission decisions made under Section 4 of the Act. Cf. *Cities Service Gas Co. v. FPC*, 255 F. 2d 860 (10th Cir. 1958), *cert. den. sub. nom. Magnolia Petroleum Co. v. Cities Service Gas Co.*, 358 U.S. 837, and *Phillips Petroleum Co. v. FPC*, 227 F. 2d 470 (10th Cir. 1955), *cert. den. sub nom. Michigan Wisconsin Pipe Line Co. v. Phillips Petroleum Co., et al.*, 350 U.S. 1005.

(D. C. Cir. 1950), *cert. den.* 340 U.S. 827, in which the Court held that the general regulation before it was not *directly* reviewable because (1) the certified record did not furnish an intelligible basis for judicial review, (2) the effect of the regulation was not apparent on its face, and (3) the regulation was not an assertion of authority under one of the many sections of the Act which specifically require a hearing such as Sections 4(c), 5(a), or 7(e).

The Court below granted the Commission motion to dismiss. However, the Court said that expeditious direct review of substantive regulations such as Order No. 242 would aid in the administration of the Act.[5] Petitioner submits that the Court of Appeals erred by extending to review of *substantive* regulations the rule of decisions involving purely *procedural* regulations, and erred by sustaining the Commission argument that aggrievement and reviewability depend on the *form* of orders rather than on the *controlling substantive effect* of the Commission adjudications of rights. The Court of Appeals did not apply the *Columbia Broadcasting System, Inc. v. United States*, supra, and *United States v. Storer Broadcasting Co.*, supra, "substantive effect" reviewability doctrine that substantive regulations directly aggrieve individual members of the class to which they are addressed and are *directly* reviewable. The basic error in the court below is its decision that the "substantive effect" test applied in these cases is not applicable to review of Order No. 242 under Section 19(b) of the Act.

In two companion cases decided in the same opinion as the

[5] The Court also held that Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, is inapplicable to review of Commission orders, but that review of such orders is governed entirely by Section 19(b) of the Natural Gas Act (App. 9a). However, Commission's argument for dismissal was based in part upon its claim that where the remedy under Section 19(b) of the Act is not adequate, Commission orders are reviewable in actions to enjoin enforcement thereof.
Prior to the Orders No. 232, 232-A and 242 cases, court decisions involving reviewability of Commission "general" orders dealt with orders which the courts found to be procedural.

instant case (*Texaco Inc. v. FPC*, Case No. 7217, and *Pan American Petroleum Corp. v. FPC*, Case No. 7303), the Court of Appeals held that Commission Order No. 232, as amended by Order No. 232-A, and subsequently by Order No. 242, is invalid and void as being contrary to and in violation of the hearing and review regulatory scheme prescribed in Sections 4, 5 and 7 of the Act.[6] The Court held that the Commission does not have authority to legislate in what it conceives to be the public interest, but that it is entirely a creature of the Natural Gas Act, and the determining question is what the Act allows. Cf. *FPC v. Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949); *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954).

Petitioner understands the Commission is filing petitions for writ of certiorari in *Texaco Inc. v. FPC*, Case No. 7217, and *Pan American Petroleum Corp. v. FPC*, Case No. 7303. In view of the fact that the Court of Appeals decisions in the instant case and in Cases No. 7217 and 7303 are interrelated and involve the same Commission orders, it is respectfully submitted that consideration of the petitions for writ of certiorari in all three cases will be facilitated if all three of the petitions are considered together.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals prevents broad application of the doctrine of this Court's decisions respecting jurisdiction to review regulatory orders.

The Court of Appeals held that the "substantive effect test" enunciated in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942); *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954), *Frozen Food Express v. United States*, 351 U.S. 40 (1956), and *United States v. Storer Broadcasting*

[6] Review in these two cases was under the Commission's construction of Section 19(b) of the Act, and the Court did not have before it the record upon which Orders No. 232, 232-A and 242 were issued.

Co., 351 U.S. 192 (1956),[1] does not govern jurisdiction under Section 19(b) of the Natural Gas Act to review substantive regulations such as Order No. 242. In so holding, the Court of Appeals misinterpreted and unduly restricted application of the broad doctrine of these cases. Its decision is inconsistent with uniform application of this Court's broad test of parties aggrieved and reviewability of regulatory orders and constitutes a serious hindrance to effective administration of Section 19(b) of the Act.

Order No. 242 (R. 277-279, J.A. 52-56, App. 25a-31a) operates directly against Petitioner (1) by requiring summary rejection of its rate filings under Sections 4(c) and (d) of the Act and its certificate applications under Section 7(c) of the Act, which are supported by gas sales contracts containing flexible pricing clauses, and (2) by depriving Petitioner of an adjudicatory hearing and findings under Sections 4(e) and 7(e) of the Act, 18 C.F.R. § 154.93 and 157.25 (App. 25a-27a). Order No. 242 operates indirectly against Petitioner by providing that its contracts containing "indefinite" pricing clauses are not evidence of gas reserves in support of pipeline company certificate applications, 18 C.F.R. § 157.14(a) (10) (v) (App. 26a).

The Court of Appeals held that, because the "substantive effect test" of reviewability is not applicable to review of natural gas orders, Petitioner is not a party aggrieved by final rate and certificate adjudications that are in the *form* of substantive regulations such as Order No. 242 and may not have *direct* review of Order No. 242 on the record in the proceedings in which it was issued. It held that the Order

[1] In these cases, the Court reviewed general regulations and policy statements issued by the Federal Communications Commission and the Interstate Commerce Commission. The *Columbia Broadcasting* case was brought in the District Court under 47 U.S.C. § 402(a) and 28 U.S.C. § 47. The *American Broadcasting* case was brought in the District Court under 47 U.S.C. § 402(a), 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, and 5 U.S.C. § 1009. The *Frozen Food* case was brought in the District Court under 49 U.S.C. § 305(g), 28 U.S.C. §§ 1336, 1398 and 2321-2325, and 5 U.S.C. § 1009. The *Storer Broadcasting* case was brought in the Court of Appeals under 47 U.S.C. § 402(a), 5 U.S.C. § 1009 and 1034.

No. 242 adjudication of substantive rights is reviewable only *indirectly* on review of orders in a *form* directed to Petitioner in its corporate name and naming a specific sale, *Pan American Petroleum Corp. v. FPC*, Case No. 7303 (App.. 1a-18a). The doctrine of the "substantive effect test" in this Court's decisions is that reviewability is determined by whether the regulation is controlling so as to require Petitioner or the Commission to take or refrain from taking specific future action. Order No. 242 is *directly* reviewable under this test. It requires the Commission Secretary to *reject summarily* without a hearing, all initial rate filings and certificate applications respecting post April 1, 1962 contracts in which Petitioner includes flexible price changing provisions. It therefore controls Petitioner by requiring it to refrain from including flexible price changing clauses in its contracts.

This Court has reiterated the delays, uncertainties and vexatious litigation that arise from failures to apply the "substantive effect test."[4] However, the Court of Appeals found that this Court has not specifically decided that this reviewability test is to be broadly applied so as to be applicable to judicial review under Section 19(b) of the Natural Gas Act. Unless this Court reverses the decision below, the Commission will continue to insist that the "controlling substantive effect test" does not govern review of natural gas orders.

There is nothing unique about the Section 19(b) provision that "Any party to a proceeding under this act aggrieved by an order . . . issued in such proceeding may obtain review of such order in the circuit court of appeals of the United States . . . by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part." However, the Commission insists that reviewability depends on the technical *form of orders* instead of the *substantive effect of decisions*. Commission insistence that decisions of this Court respecting well settled canons of judicial review are not applicable to

[4] *Administrative Law Treatise*, Kenneth C. Davis (1958), Sections 21.06-21.08.

Section 19(b) of the Act has resulted in unwarranted and expensive denials of expeditious judicial review, in depriving courts of an opportunity to review substantive regulations upon the record in the proceedings in which they are issued, in unwary persons forfeiting their right to judicial review, and in a flood of litigation by persons seeking to protect themselves against inadvertent forfeitures of judicial review.

2. The decision of the Court of Appeals constitutes an unwarranted denial of expeditious judicial review to the detriment of the courts, gas consumers, and the gas industry.

Four obviously unfavorable consequences of the Court of Appeals decision that Section 19(b) of the Act does not permit *direct review* of Order No. 242 are (1) it requires the Court of Appeals to review Order No. 242 without reviewing the record upon which it was issued, (2) it deprives producers of rights under the Act,[8] (3) it tends to cause confusion and uncertainty respecting the administration of the Act, and (4) it increases the cost of natural gas to the consuming public by increasing the cost of producer and pipeline company operations.

Under the Commission argument in support of *indirect* review, review of Order No. 242 must be accompanied by a one to three year period of enforced idleness for one of Petitioner's gas reserves and a one to three year delay in construction of the pipeline project dependent thereon. Delivery of gas and construction of the interdependent pipeline project must be delayed during the period necessary for Petitioner to negotiate a contract violating Order No. 242, prepare and file a futile certificate application, and obtain from the Commission Secretary a form rejection letter (App. 32a). In addition, the gas field and pipeline construction project must remain idle and unavailable for public service during the period of judicial review so, the case

[8] Even though Orders Nos. 232, 232-A and 242 are invalid and void, in Dockets Nos. G-7526, G-7490, G-12273, G-12363 and G-15380, Petitioner has been forced in 7 emergency situations to conform its contracts, rate filings and certificate applications thereto.

will not become moot. The cost of maintaining shut-in gas fields is a cost to Petitioner that must ultimately be paid by natural gas consumers. In the present inflationary period, postponements of pipeline construction projects unavoidably result in increased costs of construction which ultimately are paid by natural gas consumers.

If this Court's "substantive effect test" is applied to review under Section 19(b) of the Act, substantive general orders are *directly* reviewable, and, upon appropriate motion, the Court of Appeals or the Commission may order the effect thereof stayed pending final decision on review. Judicial review can then proceed without being accompanied by shut-in gas reserves and idle pipeline construction projects.[18]

As is hereafter shown, no benefits to the reviewing court, to the Commission, to the consuming public or to Petitioner result from prohibiting expeditious *direct* review and requiring *delayed indirect* review. Delays in concluding review of substantive regulations are productive of periods of uncertainty and confusion respecting the administration of the Act. Gas consumers, pipeline companies, and producers cannot plan future operations with confidence while important adjudicatory decisions of wide applicability involving important substantive rights are shrouded in uncertainty and confusion because the validity of such decisions is unresolved. In the *Columbia Broadcasting, American Broadcasting, Frozen Food* and *Storer Broadcasting* cases, supra, this Court found that such uncertainty producing delay is unwarranted where, as here, a final adjudication of substantive rights is involved.

[18]The fact that, until stayed or declared invalid, Order No. 242 requires Petitioner either to waive substantive rights by modifying its contracts, rate filings and certificate applications to comply therewith or to keep its gas fields shut in shows that Order No. 242 is a final Section 4 and 7 adjudication of substantive rights and the cases cited by the Commission below are not applicable. The orders involved in the pre-Order No. 242 cases cited by the Commission below did not require anyone to make the choice between waiver of substantive rights and keeping gas fields shut in.

Delays in judicial review are prescribed and tolerated only where necessary to enable the agency to make its final ruling and to provide the court with an adequate record for judicial review. In the instant case, the Commission made its final ruling when it issued Order No. 242, and the delays successfully interposed by the Commission actually deprived the Court of an adequate record.

3. The Commission interpretation of Section 19(b) of the Act prevents Court of Appeals review on the record made in proceedings in which substantive general orders are issued.

The Commission argued that its interpretation of Section 19(b) of the Act would result in the Court of Appeals having a more adequate record upon which to review Order No. 242. However, it had exactly the opposite effect. It deprived the Court of Appeals of an opportunity to review Order No. 242 upon the record in the rulemaking proceeding in which it was issued.[11] The record that the Commission argued should be the basis for review of Order No. 242 consists of the Commission Secretary's form rejection letter (App. 32a) and Petitioner's application for certificate of public convenience and necessity. Obviously, and in a companion case[12] the Court of Appeals so found, these documents do not shed any light upon the basis for Order No. 242.

Section 19(b) of the Act provides that "the Commission shall file with the Court [of Appeals] the record upon which the order complained of was entered," and that "upon the filing of the record" the Court's jurisdiction "shall be exclusive, to affirm, modify, or set aside such order in whole or in part." The

[11]The certified transcript of record in Docket No. R-203 comprises 389 pages. The Commission has never certified a transcript of record in Docket No. R-153. In *Pan American Petroleum Corp.* v. *FPC*, Case No. 7303 (App. 1a-18a), the Commission did not certify to the Court a record in either Docket No. R-203 or Docket No. R-153.

[12]*Pan American Petroleum Corp.* v. *FPC*, Case No. 7303, 10th Circuit (App. 1a-18a).

well settled rule of construction is that statutes are to be construed as a whole. The Commission interpretation of the first sentence of Section 19(b), prescribing the review jurisdiction of the Court of Appeals,[13] conflicts with the clear meaning of the provision requiring certification of the record. However, the jurisdictional sentence of Section 19(b) is consistent with the provision requiring certification of the record. The Court of Appeals has jurisdiction to review Order No. 242 in this case where Section 19(b) requires the Commission to certify the record upon which Order No. 242 was issued.

The Court of Appeals decision respecting Section 19(b) of the Act also conflicts with Section 2112, Title 28, United States Code, in that Section 2112 specifically provides that judicial review of regulatory agency orders requires certification of the record made in the proceeding in which the order being reviewed was issued. Section 2112 is clearly applicable to judicial review under Section 19(b) of the Natural Gas Act.

Application of the decision below to review of other substantive regulations may result in burdening the Court of Appeals and this Court with unnecessary litigation. Under Petitioner's interpretation of Section 19(b) of the Act and 28 U.S.C. § 2112, judicial review of Order No. 242 consists of review of the record in the proceedings in which it was issued; and the court in which the Commission first certifies the record acquires *exclusive* jurisdiction to review Order No. 242. Under the decision below, the record in the Order No. 242 proceedings is never certified to any court, and no court ever acquires exclusive jurisdiction to review Order No. 242. This could result in eleven separate judicial reviews of a substantive regulations such as Order No. 242 (one in each of the 11 circuits), and conflicts between the circuits. In

[13] Section 19(b) "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain review of such order in the circuit court of appeals of the United States . . . by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part."

turn, this could result in the filing of petitions for writ of certiorari seeking to resolve this unnecessary conflict.

In two recent cases, *Burlington Truck Lines, Inc., et al. v. United States, et al.*, 371 U.S. 156 (1962), and *Florida Line and Avocado Growers, Inc., et al. v. Paul, et al.*, 373 U.S. 132 (1963), the Court reiterated the well settled rule that judicial review means review of the record made in the proceeding in which the decision complained of was made. The reviewing court can then determine whether the agency decision is supported by law and has substantial basis in fact. Review under Section 19(b) of the Act is not an exception to this rule, but follows the well settled rules of judicial review stated in this Court's opinions. However, until this Court specifically so holds, it will continue to be subject to petitions for writ of certiorari filed because of conflicting decisions in the Court of Appeals respecting the validity of the same Commission order.

4. The Court of Appeals decision leaves unsettled long-standing uncertainties and conflicts respecting jurisdiction to review Commission orders.

Under the Court of Appeals decision, reviewability under Section 19(b) of the Act is governed by obscure technicalities respecting the *form* and *label* of Commission orders. This interpretation of Section 19(b) has resulted in traps for the unwary, *Public Service Comm. v. FPC*, 284 F. 2d 200 (D. C. Cir. 1960), and *Texaco Inc. v. FPC*, 290 F. 2d 149 (5th Cir. 1961),[14] and in a flood of litigation instituted by persons seeking to protect themselves against forfeiting judicial review because of erroneous determinations of the technical *form* of Commission orders. Persons subject to Commission orders should not be deprived of their right to judicial review because of failures to appreciate niceties of

[14]Compare the Commission reviewability argument in this case with the Commission reviewability arguments in *The Pure Oil Co. v. FPC*, 292 F. 2d 350 (7th Cir. 1961), *Sohio Petroleum Co. v. FPC*, 298 F. 2d 465 (10th Cir. 1961), and *Southwestern Electric Power Co. v. FPC*, 304 F. 2d 29 (5 Cir. 1962), *cert. den.* 371 U.S. 924.

the technical form of orders nor should the courts be flooded with litigation by persons seeking to protect themselves against inadvertent forfeitures of judicial review."

Under the "substantive effect" standard applied by this Court, Section 19(b) of the Act provides that reviewability is governed by the practical substantive effect of the order. The test of parties aggrieved and reviewability of orders in this case is whether Order No. 242 constitutes a final substantive decision that is controlling with respect to Petitioner's substantive rights under the Act. This is the test that was used by the Court in *Wisconsin v. FPC*, 303 F. 2d 380 (D.C., 1961) aff'd. *Wisconsin, et al. v. FPC, et al.*, 373 U.S. 294 (1963). There the Court of Appeals held that reviewability of the Commission Statement of General Policy No. 61-1 is governed by whether it sets the *final controlling standards governing Commission action upon producer rate filings* so as to constitute prejudgment and final judgment respecting rates that will be filed under Section 4 and certificate applications that will be filed under Section 7(c) of the Act.

This Court found that Statement of General Policy No. 61-1 constitutes (1) a decision to shift from the individual producer cost of service method to the area rate method of rate regulation and (2) action fixing interim area guideline rates. The opinion of this Court shows that review of the policy statement involves two issues: (1) the threshold issue, whether the Constitution and

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"The Commission itself sometimes has difficulty determining the technical form of its orders. In support of its motion to dismiss in companion case *Pan American Petroleum Corp. v. FPC*, Case No. 6973 (App. 1a-18a), the Commission vigorously argued that the November 16, 1961, letter order before the Court did not constitute temporary authorization because no Section 7 authorization was needed with respect to the contract amendment and extension involved. By order issued April 12, 1963, in Docket No. G-10955, the Commission reversed itself and set such contract amendment for hearing under Section 7(c) of the Act. The Court of Appeals interpreted the Commission letter order as constituting a temporary authorization. By order issued under Section 7(c) of the Act on June 3, 1963, in Docket No. G-10955, the Commission amended Petitioner's permanent certificate to cover the new gas committed under the contract amendment.

the Act prohibit the shift to area rate regulation, and (2) whether the particular formula for area rate regulation and the particular area rates adopted violate the Constitution or the Act. Without Commission objection, the Court reviewed the general policy statement with respect to the threshold issue but held that review upon the second issue would await orders adopting a specific area rate regulatory formula and just and reasonable area rates governing producer sales. The Order No. 242 final decision to require summary rejection of flexible price changing clause contracts is obviously more conclusive and controlling upon Petitioner's immediate substantive rights than the Statement of General Policy No. 61-1 decision to shift to area rate regulation.

The "substantive effect test" of reviewability was explicitly adopted by Federal Power Commissioner Morgan in his concurring opinion in Order issued January 30, 1963, in *Amerada Petroleum Corp., et al.*, Docket Nos. CI62-1544, *et al.* Referring to Commission refusal to permit parties to rate proceedings to controvert the area prices, Commissioner Morgan stated, "If continued, such practices will fast convert our Policy Statement 'guidelines' to irrebuttable presumptions. For as the Supreme Court explained in a similar situation, holding an agency policy to be a reviewable act: 'The particular label placed upon [its action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.' *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942)."

What Order No. 242 does is a practical, relevant, and understandable basis for determining whether it is directly reviewable. *What the form of Order No. 242 is*, is an impractical, irrelevant, and obscure basis upon which to determine reviewability. The Court of Appeals decision that the "substantive effect test" of reviewability is not applicable to *direct* review of Order No. 242 results in unnecessary and harmful delays and confusion. It deprives reviewing courts of an adequate record for review of substantive regulations and results in forfeitures of substantive rights

by the parties to such regulations. Applications of the Commission argument sustained by the Court of Appeals have resulted in inadvertent forfeitures of judicial review and in burdening the courts with unnecessary litigation.

Elimination of these evils awaits decision by this Court that reviewability under Section 19(b) of the Act is governed by the "substantive effect test" as applied by this Court to determine parties aggrieved and reviewability of orders.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1963

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM, 1963

Nos. 6947, 7135, and 7217

TEXACO, INC., *Petitioner,*

vs.

FEDERAL POWER COMMISSION, *Respondent.*

Nos. 6973, 7002, and 7303

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner,*

vs.

FEDERAL POWER COMMISSION, *Respondent.*

No. 7179

SUN OIL COMPANY, *Petitioner,*

vs.

FEDERAL POWER COMMISSION, *Respondent.*

[May 20, 1963]

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before MURRAH, Chief Judge, and BREITENSTEIN and HILL, Circuit Judges.

BREITENSTEIN, Circuit Judge.

These seven cases present another episode in the history of the regulation by the Federal Power Commission of independent producers of natural gas subject to its jurisdiction. Basically the issue is the right of the Commission to reject summarily and with-

out a hearing a gas-purchase contract between a producer and a pipeline company on the ground that the contract contains indefinite price-changing clauses forbidden by Commission regulations.

At the outset we are faced, in all but one of the cases, No. 7303, with the Commission's procedural objections to the right of the producers to maintain petitions for review in this court. The insistence of the parties on their procedural rights impels us to resist the temptation to go directly to the heart of the controversy.

The struggles of the Commission to administer the Natural Gas Act so as to regulate producers have been described many times in Commission reports and decisions and in court decisions. We shall review the situation only to the extent necessary for a background to the phase of the problem with which we are concerned.

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338, 341, the Supreme Court said that the Natural Gas Act[1] did not "abrogate private rate contracts as such" and construed §§ 4 and 5 of the Act[2] as parts of a statutory scheme under which "all rates are established initially by the natural gas companies." The gas is ordinarily sold in the field by a producer to a pipeline company which transports the gas to the area of use and there sells it to a retailer who makes distribution to the ultimate consumers. The pipelines must have a committed source of gas supply sufficient to justify financing, construction, and operation. That supply is ordinarily obtained by long-term contracts of 20 years or more. The negotiation of a long-term contract presents problems of the continued fairness and adequacy of the original selling price.[3] These problems have given rise to

[1] 15 U.S.C. § 717.

[2] 15 U.S.C. §§ 717c and 717d.

[3] Cf. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 113.

price escalation provisions.[4] We have recognized contractual provisions for price escalation as unabrogated by the Act.[5]

Within three months after the *Mobile* decision, the Commission gave notice in Docket No. R-153[6] of a proposed regulation to prohibit the filing of producers' contracts containing either pricing clauses tied to buyers' rates and pricing indices, or favored-nation clauses. This docket lay dormant until March 3, 1961, when the Commission issued its Order No. 232[7] declaring provisions for adjustment in price denoted as "indefinite escalation" clauses to be "inoperative and of no effect at law" in contracts tendered for filing after April 2, 1961. This order was superseded by Order No. 232-A[8] which added the following to the definition of "rate schedule" as contained in § 154.93 of the regulations:

> "*Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:
>
> "(1) provisions that change a price in order to reimburse

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[4] These provisions take many forms such as two-party favored-nation, three-party favored-nation, periodic escalation, redetermination, and spiral escalation. For the purposes of this decision an explanation of the differences is unnecessary except, as will later be discussed, in the differentiation between definite price-changing clauses and indefinite price-changing clauses.

[5] *Cities Service Gas Producing Company* v. *Federal Power Commission*, 10 Cir., 233 F. 2d 726, 730, certiorari denied 352 U.S. 911 (adjustments based on "prevailing field price" in a specific area); *Phillips Petroleum Company* v. *Federal Power Commission*, 10 Cir., 258 F. 2d 906, 918 (escalations tied to the "weighted average royalty rate" in a defined area); *Kerr-McGee Oil Industries, Inc.* v. *Federal Power Commission*, 10 Cir., 260 F. 2d 602 (adjustments in ratio to pipeline company's resale rate); *Warren Petroleum Corporation* v. *Federal Power Commission*, 10 Cir., 282 F. 2d 312 (adjustments under two-party favored-nation clause).

[6] 21 Fed. Reg. 2388, April 12, 1956.

[7] 25 F.P.C. 379, 26 Fed. Reg. 1983, March 8, 1961.

[8] 25 F.P.C. 609, 26 Fed. Reg. 2850, April 6, 1961.

the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;–

"(2) provisions that change a price to a specific amount at a definite date; and

"(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question."

Hereafter we shall refer to contract provisions permissible under Order No. 232-A as definite price-changing clauses and to those impermissible under that order as indefinite price-changing clauses.

Pursuant to notice given on October 10,1961, in Docket No. R-203,[9] the Commission, on February 8, 1962, issued its Order No. 242[10] which made three amendments to the regulations. Section 154.93, defining producers' rate schedules, was amended to prescribe automatic rejection of contracts containing indefinite price-changing clauses. The amendment reads:

"*Provided further*, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above [Order No. 232-A] shall be rejected."

Order No. 242 also amended §§ 157.14 and 157.25 of the regulations so as to prohibit the consideration of contracts containing the forbidden clauses in support of a pipeline's application for a certificate of convenience and necessity.

[9] 26 Fed. Reg. 9732, October 14, 1961.

[10] 27 F.P.C. 339, 27 Fed. Reg. 1356, February 14, 1962. Rehearings denied 27 F.P.C. 666.

The cases now before us attack the validity of Orders Nos. 232, 232-A, and 242. With this background we turn to the procedural questions.

Court review of Commission orders is governed by § 19(b) of the Act,[11] which provides that a party to a proceeding "aggrieved" by a Commission order may obtain a review in the court of appeals "for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business," or in the Court of Appeals for the District of Columbia Circuit. The Commission asserts that venue does not lie in the Tenth Circuit for consideration of the three petitions of Texaco, Inc., Nos. 6947, 7135, and 7217, because the petitioner is not located in, and does not have its principal place of business in, that circuit. Texaco is incorporated under Delaware law and allegedly has its principal place of business in Texas. Venue in the Tenth Circuit depends on the meaning to be given the word "located."

Texaco's petitions for review allege that its Tulsa Division has responsibility for Texaco's producing activities and operations in an area including Oklahoma and Kansas.[12] The Tulsa Division operations include "the negotiation of leases and exploration permits; geological and geophysical activities; the drilling of exploratory wells, and the development of productive areas; the payment of royalties and production taxes; the filing of state reports and the disposition of the production." In each case personnel of the Tulsa Division negotiated the contracts with the pipelines. That division supervises the performance of the contracts by Texaco, maintains records pertaining thereto, and receives payment for the gas sold. The certificate applications were made by the Tulsa Division.

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[11] 15 U.S.C. § 717r(b).

[12] Another of Texaco's seven producing department divisions is headquartered in Denver, Colorado, and has similar responsibilities for an area including Colorado, New Mexico, Utah, and Wyoming, all states of the Tenth Circuit.

The Commission asserts that the word "located" as used in § 19(b) means the same as "resides" and refers to the state of incorporation. Oddly enough, the extensive litigation over the Natural Gas Act has not produced an answer to this simple question. Perhaps the reason is that the point concerns venue rather than jurisdiction.[13] The Commission asserts a "long-established understanding" of the Commission and the natural-gas companies that "located" refers to the state of incorporation, and cites an impressive list of cases brought in the Third Circuit on the basis of the incorporation of the natural-gas companies, which were parties thereto, in one of the states of the Third Circuit. Texaco counters with an equally impressive list of cases wherein review was had in a circuit in which the natural-gas company was not incorporated and did not have its principal place of business. As venue may be waived, we are not impressed with this approach.

In a long line of decisions, beginning with *Shaw* v. *Quincy Mining Company*, 145 U.S. 444, 450, the Supreme Court has held that the residence of a corporation within the meaning of venue statutes is only the state of incorporation. In *Suttle, Administratrix* v. *Reich Bros. Construction Co.*, 333 U.S. 163, 166-167, the Supreme Court reviewed these cases and said that Congress has revealed a similar understanding in the enactment of special venue statutes. The presumption is that Congress was aware of the applicable decisions, and its recognition of them, when it enacted the Natural Gas Act.[14]

The parties agree that the pertinent language of § 19(b) was taken from § 313(b) of the Federal Power Act.[15] The legislative history of that section shows that "is located" was substituted

[13] *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 638.

[14] *Shapiro* v. *United States*, 335 U.S. 1, 16. Cf. *Public Service Company of New Mexico* v. *General Electric Company*, 10 Cir., ____ F. 2d ____, decided March 15, 1963; *United States* v. *Sanders*, 10 Cir., 145 F. 2d 458, 461.

[15] 16 U.S.C. § 825*l*(b).

for "resides."[16] The Commission says that there is no explanation of the purpose of the change. In our opinion the change is significant and the deliberate substitution of words shows a congressional intent not to narrow the provision to the state of incorporation. If Congress had so intended, it would have retained the word "resides."

The Commission urges that, unless "is located" is equated with "resides," the insertion of the phrase "principal place of business" is but an exercise in redundancy violative of the rule that all terms of a statute must be given effect. We do not agree. Congress is presumed "to have used language in accordance with the common understanding."[17] "Located" means having physical presence or existence in a place.[18] A corporation has physical presence or existence in the state of incorporation and in a state where it conducts substantial operations. Granting that a corporation is located in the state in which it has its principal place of business, the overlap in provisions must be for the purpose of clarity. The fact of the overlap does not detract from the effect of the substitution of "is located" for "resides." We deem the change in phraseology to be more significant than the overlap.

This conclusion does not intend that the mere legal indicia

[16] The first version of what ultimately developed as § 313(b) of the Federal Power Act (Part III of the Public Utilities Holding Act of 1935, Part III, Act of August 26, 1935, c. 687, § 313(b), 49 Stat. 803, 854, 860, appeared in S. 1725, 74th Cong., 1st Sess. In its briefs the Commission says that this bill provided that a person aggrieved could obtain review of a Commission order in a court of appeals "for any circuit wherein such person resides or has his principal place of business," and that a revised bill, S. 2796, contained the venue provisions now found in § 313(b). The significant modifications are that the reference point for venue is the licensee or public utility rather than the petitioner, and that the words "is located" replace "resides."

[17] *United States v. Wurts*, 303 U.S. 414, 417.

[18] Webster's New International Dictionary, 2d ed. (1959), Unabridged, defines "locate" as: "1. To designate the site or place of; • • • 2. a. To set or establish in a particular spot or position, to station. b. To establish in a charge or office. • • • ." The word "location" is defined as: "1. Act or process of locating (in various senses); fact or condition of being located, or of having position. • • • "

of "doing business" will support venue under § 19 (b). In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 10 Cir., 142 F. 2d 943, 950-951,[9] we denied a motion to dismiss and held that the petitioners in that case had their principal places of business in Colorado, saying that the question was one "of fact to be determined in each particular case." The same principle applies here and the question of whether Texaco is located in the Tenth Circuit must be determined on the particular facts. The undenied allegations of Texaco are that it conducts extensive operations in the Tenth Circuit and has two of its seven production divisions therein. More importantly, in each of the cases the gas sold is produced in the Tenth Circuit and the performance of the contract occurs in the Tenth Circuit. As all matters concerned with the applications of Texaco which resulted in the orders here sought to be reviewed took place in the Tenth Circuit, Texaco is located in that circuit for the purpose of the venue provisions of § 19(b).

The Commission has moved to dismiss cases Nos. 6947, 6973, 7002, 7135, and 7179 upon the ground that in each case the petitioner is not "aggrieved" within the requirement of § 19(b). The facts in these cases divide them into two groups which must be considered separately.

In the first group are cases Nos. 7002 and 7179.[10] Each of these seeks to review and set aside Order No. 242. That order was issued as a rule of general applicability and amended certain sections of the regulations.

In moving to dismiss these cases the Commission asserts that the Act vests no jurisdiction in the courts of appeals to review

[9] Affirmed, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581; affirmed in part, reversed in part on other grounds, *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626.

[10] No. 7179 — *Sun Oil Company* v. *Federal Power Commission* — was originally filed in the Court of Appeals for the District of Columbia Circuit and was transferred to the Tenth Circuit pursuant to the provisions of 28 U.S.C. § 2112 because of the earlier petition filed in the Tenth Circuit by Pan American in No. 7002.

orders of the Commission amending its general rules and regulations. The petitioners counter by saying that reviewability is predicated on an invasion of legal rights and that such rights of the petitioners are directly affected by Order No. 242.

The Tenth Circuit is committed to the view that § 10 of the Administrative Procedures Act[21] is inapplicable to the review of Commission orders under the Natural Gas Act.[22] Accordingly the right of review is governed entirely by § 19(b) of the Natural Gas Act. That section permits review on the petition of a party aggrieved. The query is when, and in what circumstances, is a party aggrieved.

Sales of gas by producers to pipelines are initiated by private contract and those contracts are subject to review by the Commission under statutory standards. No right exists in the seller to change a rate fixed by contract unless the contract itself recognizes a right to change the rate. An order of the Commission proscribing price-changing provisions is an interference with the right to contract and a denial of a substantive right. Without considering for the moment the question of the power of the Commission to interfere with such a substantive right, those to whom the right is denied are entitled to court review of such action to test whether the action is within the statutory powers of the Commission. The problem is how this review may be had under § 19(b).

An easy and quick method of reviewing orders which affect substantive rights and which are of general applicability would aid the administration of the Act. The difficulty is that the Commission has construed § 19(b) so as to preclude any such expeditious review and the position of the Commission has been quite uniformly upheld by the courts.

In seeking reviews of orders of general applicability the

[21] 5 U.S.C. § 1009.

[22] *Amerada Petroleum Corporation* v. *Federal Power Commission*, 10 Cir., 231 F. 2d 461, 465.

petitioners rely on the decisions in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, in which rules of general applicability affecting substantial rights were held reviewable under other statutes. The courts of appeals have not applied these decisions in determining rights to review under § 19(b). Without going into the distinctions and differences which have been stated, the controlling point has been that a person is not aggrieved by a general order and cannot complain until a personal right is impinged by a special order. The Tenth Circuit, in *Amerada Petroleum Corporation* v. *Federal Power Commission*, 10 Cir., 231 F. 2d 461, declined to review orders issuing rules after the decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672. In so holding it relied heavily on *United Gas Pipe Line Co.* v. *Federal Power Commission*, D.C. Cir., 181 F. 2d 796, certiorari denied 340 U.S. 827, and that court's treatment of the *Columbia Broadcasting* case. More recently, the Fifth Circuit has sustained Commission motions to dismiss petitions seeking to review Order No. 232-A[23] and to review Order No. 242.[24] We accept these decisions as correct applications of § 19(b). Certainly the language of the statute is strained if review may be had of a negative order of general applicability by a party who has not been, and may never be, affected by the order except in a theoretical manner. Accordingly, Nos. 7002 and 7179 must be dismissed on the ground that the petitioners are not aggrieved within the meaning of § 19(b).

The second group of cases attacks special orders made under the authority of the mentioned general orders. In each instance the questioned decisions have granted the authority sought but

[23] *Sun Oil Company* v. *Federal Power Commission*, 5 Cir., 304 F. 2d 293, certiorari denied 371 U.S. 861.

[24] *Hunt Oil Company* v. *Federal Power Commission*, 5 Cir., 306 F. 2d 878. The Third Circuit took similar action in an unreported case, *Shell Oil Company* v. *Federal Power Commission*, case No. 14058, decided July 17, 1962.

provide that any application for a rate change under an impermissible price-changing clause will be rejected.

Nos. 6947, 6973, and 7135 concern applications for certificates of convenience and necessity covering gas sales by producers to pipelines. In Nos. 6947 and 7135 the same contract is presented, one for the sale by Texaco to Lone Star Gas Company of gas produced in the Carter-Knox Field, Stephens County, Oklahoma. In No. 6973 the sale is by Pan American to Mountain Fuel Supply Company of gas from the Middle Mountain Unit Area, Sweetwater County, Wyoming. Each contract was made or amended after the effective date of Order No. 232-A and contains indefinite price-changing clauses. The Commission granted temporary authorizations in Nos. 6947 and 6973. A permanent certificate was granted in No. 7135 for the same service as that presented in No. 6947.

In each of the three cases the order of the Commission contains this provision in substantially identical language:

> "Further, in the event that any of the documents comprising the listed rate schedules and supplements was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected."

The petitions for review in these cases are directed against the quoted provision of the respective orders. The Commission has moved to dismiss each on the ground that the petitioner is not a party aggrieved.

On the one hand the petitioners say that Order No. 232-A, as implemented by the orders containing the provision in question, has effectively nullified indefinite price-changing clauses and thus

deprived petitioners of contract rights assured to them by the Act and by the *Mobile* decision. On the other hand the Commission urges that the orders sought to be reviewed in these cases do not themselves adversely affect the petitioners but only affect their rights adversely on the contingency of future administrative action.

In *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 10 Cir., 270 F. 2d 404, 407, the Tenth Circuit dismissed, on Commission motion, a petition to review a Commission order authorizing temporary service and providing that service once instituted could not be discontinued without Commission permission. Objection was made to the provision for termination of service. The dismissal was on the ground that the petitioner had not sought to terminate and, hence, was not aggrieved.[25] In *Sun Oil Company* v. *Federal Power Commission*, 5 Cir., 304 F. 2d 290, certiorari denied 371 U.S. 861, the Fifth Circuit was confronted with a situation comparable to the one here presented. Objection was made to the inclusion in an authorization for temporary service of a provision, similar to that appearing in Nos. 6947, 6973, and 7135, for the rejection of rate increases covered by impermissible price-changing clauses. The court sustained the Commission motion to dismiss saying that the clause attacked was interlocutory and not reviewable.

We conclude that the provisions of the orders attacked in Nos. 6947, 6973, and 7135 do not adversely affect any right of the petitioners and, hence, the petitioners are not aggrieved within the requirement of § 19(b). That conclusion does not mean that Orders Nos. 232, 232-A, and 242 are valid or that contracts executed after the effective date of those orders are "inoperative" or "of no effect at law" when they contain indefinite price-changing clauses.

[25] The court, quoting from *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 130, said: "• • • the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action."

This brings us to No. 7303, in which the Commission has interposed no procedural objections to the petition for review, and to No. 7217 in which we hold that the motion to dismiss must be denied. In each of those the Commission rejected an application for a certificate of convenience and necessity on the ground that the underlying contract contained pricing provisions not permissible under § 154.93, as amended by Order No. 232-A.[26] The rejection was based on Order No. 242. As we have heretofore stated, that order provides for the rejection of applications for certificates when the underlying contract contains price-changing clauses forbidden by Order No. 232-A.

Our difficulty is immediately apparent. The summary rejection of the Texaco and Pan American contracts without a hearing deprives the court of any record upon which the rejection may be sustained, other than the general orders which are attacked. As we have noted above, the Commission has successfully maintained that these general orders are not subject to direct court review. This bootstrap operation of the Commission, in practical effect, circumvents court review of the basic question -- the propriety of indefinite price-changing clauses.

Neither sympathy for the administrative difficulties of the Commission nor recognition of its expertise in the regulation of those subject to the Natural Gas Act justifies disregard of the statutes under which the Commission operates. We find no statutory authorization for the Commission actions here attacked.

Section 16 of the Act [27] empowers the Commission to make rules and regulations to carry out the provisions of the Act but

[26] No. 7217 relates to an application by Texaco for a certificate covering a sale by it to Natural Gas Pipeline Company of America of gas produced in the Camrick Southeast Field, Beaver County, Oklahoma. The application in No. 7303 is based on a contract for the sale by Pan American to Colorado Interstate Gas Company of gas produced in the Beaver Creek Field, Fremont County, Wyoming. Each contract contains indefinite price-changing clauses.

[27] 15 U.S.C. § 717o.

that section is not a source of power to regulate in conflict with substantive provisions of the Act.[28] The Commission asserts that the necessary authority flows from §§ 4, 5, and 7.[29]

Sections 4 and 5 relate to rates and charges and give the Commission power to modify contracts — not to make contracts. The power to modify can be exercised only after hearing. The controlling standard is what is just and reasonable.[30]

Section 7(c) provides that no natural-gas company "shall engage in the transporatation or sale of natural gas" without a certificate of public convenience and necessity and with immaterial exceptions requires the Commission to set "for hearing" applications to obtain such certificates. Section 7(e) states that the certificate will issue if the Commission finds that the pro-

[28] Cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508. See also *Willmut Gas & Oil Company* v. *Federal Power Commission*, D.C. Cir., 294 F. 2d 245, 250, certiorari denied 368 U.S. 975, saying that § 16 does not permit the Commission to promulgate rules inconsistent with the Act and thus result in a legislative change.

[29] 15 U.S.C. §§ 717c, 717d, and 717f.

[30] Section 4, subparagraph (a), provides that all rates and charges must be just and reasonable. Subparagraph (c) requires the filing of schedules showing all rates and charges "together with all contracts which in any manner affect or relate to such rates, charges, • • •." Subparagraph (d) forbids a change in a rate or charge without 30-days' notice to the Commission. Subparagraph (e) provides that when a new rate schedule is filed, the Commission, either on complaint or on its own initiative, but on reasonable notice may "enter upon a hearing concerning the lawfulness" thereof; that the Commission may suspend a new schedule for five months; that "after full hearings, • • • the Commission may make such orders with reference thereto as would be proper" in a § 5 proceeding; and that if the proceedings have not been concluded and an order entered at the end of the suspension period, the proposed change shall go into effect but the Commission may require a bond for refund of overpayments.

So far as material, § 5 provides that when the Commission, "after a hearing," on its own motion or on complaint, finds that a "rate, charge, or classification" or "any rule, regulation, practice, or contract" having an effect thereon, is "unjust, unreasonable, unduly discriminatory, or preferential," the Commission shall determine and fix by order "the just and reasonable rate, charge, classification, rule, regulation, practice, or contract."

posed service "is or will be required by the present or future public convenience and necessity."

The Commission held no hearings relative to the promulgation of Orders Nos. 232, 232-A, or 242. Nevertheless, the Commission made findings allegedly justifying such orders.[31] In summary the Commission found that indefinite price-changing clauses are "undesirable, unnecessary and incompatible with the public interest;"[32] that such contract provisions "have resulted in a flood of almost simultaneous filings" which "bear no apparent relationship to the economic requirements of the producers who file them;" and that such filings "have created a significant portion of the administrative burdens under which this Commission is laboring today."[33]

These findings are not made in the language of the statutory standards of "just and reasonable" and "public convenience and necessity." The public interest must be related to and tested by these standards. Although the Commission is the guardian of the public interest in the administration of the Act, the Commission may not substitute its standards for the statutory standards. Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them.[34] In the cases at bar the Commission has held no adversary hearings at which facts have been adduced to sustain

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[31] These findings are reported for Order No. 232, at 25 F.P.C. 380, 26 Fed. Reg. 1983; for Order No. 232-A at 25 F.P.C. 609, 26 Fed. Reg. 2850; and for Order No. 242 at 27 F.P.C. 339-340, 27 Fed. Reg. 1356.

[32] 25 F.P.C. 380, 26 Fed. Reg. 1983.

[33] 27 F.P.C. 340, 27 Fed. Reg. 1357.

[34] The Commission's reliance on its decision in the case of *The Pure Oil Company*, 25 F.P.C. 383, is not helpful. The Commission there held that indefinite escalation provisions are, in general, contrary to the public interest. The Commission order was affirmed on review, *Pure Oil Company* v. *Federal Power Commission*, 7 Cir., 299 F. 2d 370, but the court did not discuss the problems with which we are concerned. In any event a record made in that proceeding is not dispositive of the issues now under consideration.

findings which, on the basis of statutory standards, support the decisions reached. No amount of administrative expertise can supply these deficiencies.

The Commission vigorously asserts the validity of Orders Nos. 232, 232-A, and 242 as orders of general application within Commission power which are desirable and preferable to a case-by-case approach to the regulatory problems. At the same time the Commission with equal vigor says that the orders are reviewable only on a case-by-case basis after rejection of a particular contract containing clauses impermissible under the general orders. Such a divided approach to a basic and difficult problem cannot throw a cloak of conclusive validity over general orders. If the general orders are not themselves reviewable and if special orders based thereon are not reviewable when the result falls short of the denial of a presently asserted substantive right, then those general orders are only of an advisory nature and neither forbid the inclusion in contracts of indefinite price-changing clauses nor justify the rejection, on the sole ground of violation of general regulations, of contracts containing such clauses.

The Commission argues that in making the challenged orders it was "legislating interstitially, as contemplated by the Act." Although the "filling in the interstices of the Act" may be performed through a "quasi-legislative promulgation of rules,"[35] administrative officers must keep within the bounds of their administrative powers,[36] which are limited by the scope of the statute.[37] In *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617-618, the Supreme Court said:

> " * * * not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amen-

[35] *Security & Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 202.

[36] *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236.

[37] *Federal Communications Commission* v. *American Broadcasting Co., Inc.*, 347 U.S. 284, 290.

datory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. * * * For the ultimate question is what has Congress commanded * * * ."

Under the Natural Gas Act and the *Mobile* decision, rates and charges for the sale of gas are initially prescribed by private contract and may be increased only in accordance with contract provisions. Contracts establishing such rates and charges and providing for changes therein may be modified by the Commission only after hearing and then only by the application of the Standards of "just and reasonable" and "public convenience and necessity." The summary rejection of applications based on contracts containing price-changing clauses, of which the Commission does not approve, deprives the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review.

Perhaps in some regards the Commission may "legislate interstitially" but in our opinion it may not do so when its action results in the denial of substantive rights. The horrendous consequences of such actions are well described in *Hunt v. Federal Power Commission*, 5 Cir., 306 F. 2d 334, 342-345, and need not be repeated here. Within its constitutional powers Congress may legislate on substantive rights without hearings and findings. The Commission has attempted to usurp that congressional power. No claim of administrative need of of frustration in the performance of its duties can make up for the lack of statutory authority.

We are deciding only the cases before us. The problems of area pricing are not presented here. In our opinion Order No. 242 is void and without effect. Orders Nos. 232 and 232-A are in a different category. As advisory declarations of Commission policy they determine no rights. At the same time those orders do not, and cannot, invalidate either retroactively or prospectively price-changing clauses in a gas-sale contract between a producer

and a pipeline and are no justification for the rejection, without hearing, of a rate or charge based on such clauses.

For the reasons stated the motions to dismiss Nos. 6947, 6973, 7002, 7135, and 7179 are sustained and those cases are dismissed. The motion to dismiss No. 7217 is denied. The orders of the Commission in Nos. 7217 and 7303 are set aside and held for naught and the cases are remanded for further consideration in accordance with the views expressed in this opinion.

Pertinent Excerpts from Natural Gas Act

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

Section 4. * * * (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate; and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. [15 U.S.C. § 717c (c)]

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [15 U.S.C. § 717c (d)]

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing

concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [15 U.S.C. § 717c (e)]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

Section 5. (a) Whenever the Commission, after a hearing

had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [15 U.S.C. § 717d (a)]

* * * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

Section 7. * * * (c) No natural gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission,

on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [15 U.S.C. § 717f (c)]

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public con-

venience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [15 U.S.C. § 717f (e)]

* * *

REHEARING; COURT REVIEW OF ORDERS

Section 19 * * * (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there was reasonable grounds for failure to adduce such evidence in the proceedings before the

Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended. [15 U.S.C. § 717r (b)]

Pertinent Excerpts From Federal Power Commission Regulations Under Natural Gas Act

18 C.F.R. Section 152.1 et seq.

§ 154.93 Rate Schedule defined. (Independent Producers)*

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law: the permissible provisions for a change in price are:*

(a) *Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;*

(b) *Provisions that change a price to a specific amount at a definite date; and*

(c) *Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension*

*Italicized portion is Order No. 232 as amended by Orders No. 232-A and 242.

*or certificate proceedings, and, are in the area of the price in question: Provided further, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.**

[Order 174-B, 19 F.R. 8807, Dec. 25, 1954, as amended by Order 232, 26 F.R. 1983, Mar. 8, 1961, Order 232-A, 26 F.R. 2850, Apr. 6, 1961, Order 242, 27 F.R. 1356, Feb. 14, 1962]

§ 157.14(a)[1]

(10) Exhibit H — Total gas supply data

(v) A conformed copy of each gas purchase contract upon which applicant proposes to rely: *Provided, however,* That only three of the total number of copies of Exhibit H filed need include a copy of such contract. Contracts already on file with the Commission may be incorporated by reference without supplying additional copies, provided such contracts are identified with particularity by stating the exact pages of the contracts to be incorporated by reference and the file or docket number designation to which reference is made; provided further, that the Commission of the presiding officer may direct that additional copies of such contracts be furnished to the Commission or to other parties to the proceeding: *Provided further, however, That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter.**

[as amended by Order No. 242]

§ 157.25[2] Necessary exhibits

Exhibit B. Contracts. Conformed copy of each contract for

*Emphasis supplied, italicized portion constitutes Order No. 232, as amended by Order No. 232-A, and further amended by Order No. 242

[1] Regulations applicable to pipe line companies

[2] Regulations applicable to independent producers. Full text of Order No. 242 is reproduced pp. infra

sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24(b); *And provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. *On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price changing provisions other than those defined as permissible in § 154.93 of this chapter.**

[as amended by Order No. 242]

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*Emphasis supplied; italicized portion at end constitutes Order No. 232, as amended by Order No. 232-A, and further amended by Order No. 242

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., and Charles R. Ross.

Docket No. R-203

Rejection of Sales Contracts Containing Indefinite Escalation Clauses and of Applications Relying upon Such Contracts for Gas Supply

Order No. 242
Amending Regulations Under the Natural Gas Act

(18 CFR 154.93, 157.14, 157.25)

(Issued February 8, 1962)

In this proceeding the Commission has under consideration the amendment of §§ 154.93, 157.14(a) (10) Exhibit H (v) and 157.25, Subchapter E, Regulations Under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations.

By Order No. 232A, issued March 31, 1961 (26 F.R. 2850, 25 FPC 609), the Commission amended section 154.93 of its Regulations so as to provide that indefinite price escalation clauses in sales contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, would be inoperative and of no effect at law. The amendments herein adopted provide for (1) the rejection of contracts containing such indefinite escalation clauses, (2) the rejection of applications by producers for certificates of public convenience and necessity relying for a gas supply upon contracts containing such indefinite escalation provisions, and (3) the Commission's refusal to consider such contracts submitted in support of certificate applications by pipeline companies.

Public notice of proposed rulemaking was given by publication in the Federal Register on October 10, 1961 (26 F.R.

9732), and by mailing copies thereof to interested persons, including natural gas companies, and to State and Federal agencies. In response to such notice, numerous comments were submitted. These comments have been carefully considered but, for the reasons set forth below, we adhere to the substance of the amendments as originally proposed.

A number of parties contend that the promulgation of these regulations would be unlawful and beyond the powers granted to the Commission by the Natural Gas Act. We conclude, however, that sections 4, 5, and 7 of the Natural Gas Act contemplate that the Commission will refuse to approve contractual provisions found adverse to the public interest. Section 16 of the Act, of course, authorizes the Commission to issue rules and regulations of general applicability found necessary or appropriate to carry out the provisions of the Act.

Protection of the public interest is the touchstone of our regulatory powers under the Natural Gas Act. The Commission's obligation under the Act to the natural gas companies, as one segment of the public whose interest is to be protected, does not compel it to acquiesce in the use of contracts which carry provisions incompatible with a scheme of effective rate regulation. To be sure, the proposed rule will have impact upon contractual practices which have been fairly widespread. But the real issue is not one of "freedom of contract;" the question is whether the rule is rationally related to a condition which requires correction if regulatory objectives embraced by the statute are to be achieved. See *American Trucking Associations v. United States*, 344 U.S. 298. In our view, the rule we adopt fully meets this test.

We held in the *Pure Oil* case[1] that indefinite escalation clauses are contrary to the public interest and restated this conclusion in Order No. 232A. Increases in producer prices, triggered by indefinite escalation clauses, have resulted in a flood

[1] *The Pure Oil Company*, 25 FPC 383.

of almost simultaneous filings. These filings bear no apparent relationship to the economic requirements of the producers who file them. The Natural Gas Act contemplates that prices, to be just and reasonable, be related to economic needs. The elimination of indefinite escalation provisions does not, of course, cut off other avenues by which a producer may make provisions for filing for increased rates.

Filings under indefinite escalation clauses have created a significant portion of the administrative burdens under which this Commission is laboring today. The Natural Gas Act contemplates that rate increases shall be sought when there is economic justification, but not that there shall be a chain reaction in a wide area whenever one producer in the area negotiates a contract at a new price level. The Act requires the Commission to give precedence to the hearing and decision of rate increases, but the complexity of indefinite price clauses requires it to spend an undue amount of time in their interpretation and application at the expense of making a prompt determination of the rate issues involved. Accordingly, in protecting the public against waves of increases which have no defensible basis, we also serve the need — which we believe we should take into account — of making the tasks of regulation more manageable.

It has been brought to our attention that section 154.93 of the Regulations, as amended by Order No. 233A, refers to the date of execution of a contract, rather than the filing date (to which we referred in the notice of this proceeding). It is suggested that this point should be clarified. The Commission agrees and has made appropriate changes. In order to conform the language of the amendments to our existing regulations, we have also changed the phrase "price-escalation provisions" to "price-changing provisions."

The Commission, acting pursuant to authority granted by the Natural Gas Act, particularly sections 4, 5, 7, and 16 thereof (15 U.S.C. 717c, 717d, 717f, and 717o), *orders* that Parts 154

and 157, Subchapter E, Chapter I, of Title 18 of the Code of Federal Regulations be amended as follows:

(A) § 154.93 *Rate Schedule Defined*, is amended by adding a provision at the end thereof to read:

> *Provided further*, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

(B) § 157.14(a) (10) *Exhibit H — Total Gas Supply Data* (v), is amended by adding a proviso at the end thereto to read:

> *Provided, further, however*, That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains any price-changing provisions other than those defined as permissible in § 154.93 hereof.

(C) § 157.25 *Necessary exhibits, Exhibits B, Contracts*, is amended by deleting all the language after the first sentence thereof, ending with the words "Natural Gas Act," and inserting in lieu thereof the following:

> On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 hereof.

(D) These amendments shall become effective on April 2, 1962.

(E) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

By the Commission. Commissioner O'Connor not participating.

s/ Joseph H. Gutride
Joseph H. Gutride,
Secretary

(Seal)

ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

Docket No. CI63-867
Pan American Petroleum Corporation

February 19, 1963

Pan American Petroleum Corporation
P. O. Box 40
Casper, Wyoming

Attention: Mr. Harold H. Young, Jr.

Gentlemen:

This is with reference to your letter of January 14, 1963, submitting an application for certificate of public convenience and necessity, assigned Docket No. CI63-867, for proposed sales of gas to Colorado Interstate Gas Company from the Beaver Creek Field (Phosphoria Formation), Fremont County, Wyoming.

The sales are proposed to be made pursuant to a contract dated October 4, 1962, attached as an exhibit to your certificate application. The contract incorporates pricing provisions other than those permitted by Section 154.93 of the Commission's Regulations. Therefore, in accordance with Sections 154.93 and 154.100 of the Regulations, your certificate application and exhibits thereto are hereby rejected. All available copies are returned herewith.

This rejection is without prejudice to the resubmittal of an original and seven copies of your application and exhibits thereto which do not contain the unacceptable pricing provisions.

Very truly yours,

/s/ J. H. Gutride
Secretary

Enclosure No. 1226

cc: Colorado Interstate Gas Company
P. O. Box 1087
Colorado Springs, Colorado

Joe P. Hammond, General Attorney
Pan American Petroleum Corporation
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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 387

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–18a) is reported in 317 F. 2d 796, at pp. 802–803 (C.A. 10, No. 7002). Order 242 of the Federal Power Commission (Pet. App. 28a–31a) is reported at 27 F.P.C. 339, 27 Fed. Reg. 1356.

JURISDICTION

The judgment was entered on May 20, 1963, and the petition for a writ of certiorari filed on August 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

The Federal Power Commission amended its Rules and Regulations under the Natural Gas Act to provide that, in the future, contracts by gas producers would not be recognized or accepted in Commission proceedings if they contained certain types of price-changing provisions found incompatible with the public interest. The question presented is whether a court of appeals has jurisdiction under Section 19(b) of the Natural Gas Act to review the order promulgating that amendment or whether, as the court below held, review is available only when the Commission makes a specific application of the regulation to the party claiming aggrievement.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act are set forth in the petition at pp. 19a–24a.

STATEMENT

Petitioner sought review in the court of appeals of Federal Power Commission Order 242, issued on February 8, 1962. This order amended Section 154.93 of the Commission's Regulations under the Natural Gas Act to provide that contracts for gas sales executed by producers on or after April 2, 1962, may not be filed with the Commission as rate schedules if they contain provisions for changes in price other than the three types of provisions specified in the order (Pet. 6). The order also provided that contracts containing the proscribed provisions could not be filed in support of a producer's application for a certificate or serve as evidence of an adequate gas supply in a

pipeline certificate proceeding. The three permitted types of price-changing provisions are as follows:

(1) Changes which reimburse a seller for changes in production, severance, or gathering taxes laid on him;

(2) Changes to a specific amount on a definite date; and

(3) Changes based on price redeterminations made at intervals of not less than five years, and to a rate not higher than a producer rate in the same area not in issue in suspension or certificate proceedings, and subject to Commission jurisdiction.

Order 242 supplements Order 232–A, a prior Commission order providing that all but the three types of price-changing provisions enumerated above, if included in contracts executed on or after April 2, 1961, would "be inoperative and of no effect at law". Order 232–A, issued on March 31, 1961, 26 Fed. Reg. 2850, 25 F.P.C. 609, had modified a still earlier order (Order 232, 25 F.P.C. 379, 26 Fed. Reg. 1983) relating to the same subject. Order 232, as modified by Order 232–A, implemented by rule the Commission's decision in an adjudicatory proceeding, *Pure Oil Company*, 25 F.P.C. 383 (issued March 3, 1961)—a decision holding that indefinite escalation clauses in producer contracts were contrary to the public interest because such provisions have caused instability and uncertainty in the industry and among consumers. Both Orders 232 and 242 were promulgated after notices of proposed rule-making had been issued, 21 Fed. Reg. 2388; 26 Fed. Reg. 9732, and

after the receipt of comments by interested parties.[1] Thus, the order which petitioner sought to have reviewed in the court of appeals was based upon a policy formulated in two rule-making proceedings and an adjudicatory hearing. The Commission regulations implementing that policy had not, however, been applied to petitioner when it filed its petition in the court below.

Action on a motion by the Commission to dismiss the petition for review was deferred by the court of appeals pending argument on the merits. The court also consolidated the proceeding with other petitions (including one filed by petitioner) to review Commission rejections of specific filings pursuant to the regulations as amended by Order 242. After hearing argument, the court of appeals granted the Commission's motion to dismiss Pan American's petition in No. 7002 (as well as another petition by another company) on the ground that it was not aggrieved by the promulgation of the regulations, (Pet. App. 8a–10a, 317 F. 2d at 803). The same opinion, in dealing with two other cases, set aside specific actions taken by the Commission pursuant to the regulation. Indeed, one of these two cases involved the Commission's rejection of a filing tendered by the present petitioner. Pet. App. 13a–18a; *Pan American Petroleum Corporation* v. *Federal Power Commission*, 317 F. 2d 796, 804–807 (C.A. 10 No. 7303); *Texaco Inc.* v. *Federal Power Com-*

[1] In view of the time which elapsed between the Notice of Proposed Rulemaking in Order 232 and the issuance of the Order, the Commission postponed the effective date of the regulation to allow interested parties to comment further. Order 232-A amended Order 232 in response to these comments.

mission, ibid. (C.A. 10 No. 7217). The Commission has filed a petition for certiorari seeking reversal of the court of appeal's decision holding Orde. 242 invalid as there applied.[2] The instant petition (No. 387) deals only with the court's dismissal of the petition to review Order 242 itself (in C.A. 10 No. 7002).

ARGUMENT

1. The instant case (No. 7002 in the court of appeals) is one of a number of cases consolidated in the court below. The order of dismissal which petitioner challenges determined only that the Commission's exercise of its rule-making power was not reviewable until its regulation was specifically applied to the producer claiming aggrievement. In several of the other consolidated cases (including another case instituted by this same petitioner), the Commission's regulations had been applied, and there was no question of standing or aggrievement; in those cases, the court of appeals reached the question whether the Commission had power to deal with the subject matter at hand by an exercise of the rule-making authority. The court of appeals answered that question in the negative, and the Commission has petitioned for certiorari in those cases (No. 386, this Term).

It thus appears that the question of the Commission's power to adopt rules governing the price-changing practices of gas producers is already before the Court on the government's petition filed in cases where that issue is plainly ripe. If the Court should

[2] Petition for certiorari filed August 19, 1963, *Federal Power Commission* v. *Texaco Inc. and Pan American Petroleum Corporation*, No. 386.

grant the government's petition and reverse the decision below, the court of appeals, on remand of the case, would be required to decide the further question (which it did not reach) whether the particular regulation adopted is a reasonable one. Pan American would be heard on that issue since it is involved in No. 386 as a respondent. If, on the other hand, this Court should fail to disturb the holding challenged by the Commission, Pan American would have the benefit of a determination that the Commission's regulation was invalid because it was outside the rule-making power of the agency. On any view of the matter, it is difficult to see how grant of the instant petition of Pan American would do any more than complicate the procedings. It would serve only to inject an issue as to prematurity, albeit there are already before the Court cases which are indisputably ripe for its consideration.

One additional development should be noted before we turn to Pan American's contention that the court below erred in its disposition of case No. 7002. Since the date of the Tenth Circuit's decision in these cases, the Ninth Circuit has decided *Superior Oil Co.* v. *Federal Power Commission*, No. 18,252, August 26, 1963. By supplement to our petition in No. 386, we have brought this decision to the attention of the Court. The Ninth Circuit, as we there point out, has concluded (1) that the Commission has authority to regulate the pricing practices in question by rule and (2)

that the particular rule adopted by the Commission was neither arbitrary nor capricious. We have every reason to believe that a petition for a writ of certiorari will be filed by Superior Oil in that case, in which event the Court will have before it both of the questions noted immediately above. If the writ should be granted in the *Superior* case, the government would have no objection whatever should Pan American wish to file a brief *amicus curiae* in that case in order to address itself to the merits of the particular rule adopted.

2. As to the immediate question whether the court of appeals correctly dismissed case No. 7002 as premature, we point out that only last Term this Court refused to review a comparable decision of the Fifth Circuit which ruled that the Commission's Orders 232 and 232-A were not reviewable in advance of their application to a concrete case, *Sun Oil Co.* v. *Federal Power Commission*, 304 F. 2d 293, certiorari denied, 371 U.S. 861.[3]

Pan American does not suggest that the reviewability of Order 242 presents any question different from that involved in an effort to secure review of Orders 232 and 232-A. The court below (Pet. App. 10a, 317 F. 2d at pp. 802-803) relied upon prior

[3] In holding Orders 232 and 232-A non-reviewable, the Fifth Circuit recognized that the validity of the amended regulation would be subject to review when properly presented on a specific application of the regulation by the Commission.

decisions under Section 19(b) of the Gas Act[*] holding that "a person is not aggrieved [within the meaning of that Section] by a general order and cannot complain until a personal right is impinged by a special order" and that "a party who has not been, and may never be, affected by the order except in a theoretical manner * * * [is] not aggrieved within the meaning of § 19(b)." It cited, among others, the *Sun Oil* case, *supra*, as well as the *Shell* and *Hunt* cases (*supra*, note 4), both of which held that this very Order 242 was not reviewable in the abstract. No intervening circumstance suggests that there is any more reason to grant the instant petition than the one denied in the *Sun Oil* case.

On the contrary, the question which this petitioner seeks to raise—whether Order 242 may be challenged before it has been applied—has obviously receded in importance, for, as pointed out above, the order has now been repeatedly applied, and there is currently pending before the Court a case in which the underlying substantive issues are squarely presented, *supra*, note 2.

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[*] *E.g.*, *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (C.A. 10); *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F. 2d 796, 799 (C.A. D.C.), certiorari denied, 340 U.S. 827; *Sun Oil Co.* v. *Federal Power Commission*, 304 F. 2d 293 (C.A. 5), certiorari denied, 371 U.S. 861; *Shell Oil Co.* v. *Federal Power Commission*, C.A. 3, No. 14058, decided July 17, 1962 (unreported); *Hunt Oil Co.* v. *Federal Power Commission*, 306 F. 2d 878 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

FEDERAL POWER COMMISSION, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER PAN AMERICAN PETROLEUM CORPORATION

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REPLY BRIEF FOR PETITIONER PAN AMERICAN PETROLEUM CORPORATION

In this case and companion case No. 386, the Commission's arguments conclusively show that the Petition in the instant case should be granted:

1. All parties in this case and in No. 386 emphasize two important, inseparable questions under the Natural Gas Act: (a) the question of reviewability of a

substantive "general" order upon the record in a rule-making proceeding, raised in this case; and (b) the question of substantive validity of a specific "general" order, raised in No. 386. The Commission cannot dispute the general importance of underlying issues as to applicability of this Court's decisions respecting direct review of "general" orders, as to necessity for expeditious judicial review, and as to desirability for review upon the record in the proceeding in which an order is issued. The Commission, however, does attempt to minimize the intertwining of these questions with the question raised by the Commission in No. 386. In so doing, the Commission rests upon three erroneous claims: (a) that the instant case "is one of a number of consolidated cases in the Court below"; (b) that the question is "whether the Court of Appeals correctly dismissed the instant case as premature"; and (c) that the instant case "has obviously receded in importance." None of these claims is correct.

2. Contrary to the Commission's implication, the instant case and the *Texaco* and *Pan American* cases before this Court in No. 386 were not fully consolidated below. Each case was considered on its separate record, as reflected by the several certified records deposited in this Court by petitioners in Nos. 386 and 387. As a result, unless the Petition in No. 387 is granted, this Court will not have before it the three principal records actually considered by the Tenth Circuit in review of arguments of parties now involved in No. 386. Consideration of all three records is of continued importance, and the posture of the three records is now also relevant to any issues as to a stated conflict and as to questions not properly considered by the Ninth Circuit in *Superior Oil Co.* v. *Federal*

Power Commission, No. 18,252, August 26, 1963 (petition for rehearing *en banc* filed on or about September 23, 1963).[1] Under these circumstances, granting of the Petition in No. 387 will bring to the Court the underlying record in the basic rule-making proceeding for consideration of the question of direct reviewability, and, in conjunction with No. 386, of the posture of all questions as reached by the Tenth Circuit.

3. Contrary to the Commission's assertion, the court below did not hold that Order No. 242 was not "ripe" for direct review in the instant case or that that order should not be reviewed in a direct appeal upon the rule-making record. Instead, the court below held that the Commission's interpretation of Section 19(b) of the Act "preclude[s] any such expeditious review." The court stated its difficulty (317 F. 2d at 802-803):

> "An easy and quick method of reviewing orders which affect substantive rights and which are of general applicability would aid the administration of the Act. The difficulty is that the Commission has construed § 19(b) so as to preclude any such

[1] In addition to questions raised by the expressed holdings of the Ninth Circuit in *Superior*, underlying the decision of that court are at least two questions affecting validity of its judgment. The first involves absence of jurisdiction in that court to consider validity of Order No. 242 *per se* when the record upon which Order No. 242 was based had been and still is certified to the Tenth Circuit under provisions of Section 19(b) of the Natural Gas Act which provide for vesting of "exclusive jurisdiction" for review of a Commission order in the court to which such a record has been certified. A second such question is correctness of the Ninth Circuit's proceeding to a question of "reasonableness" of a Commission rule in the absence of the record and the findings upon which the Commission relied to support claimed "reasonableness" of such rule. *Cf. Burlington Truck Lines, Inc., et al.* v. *United States, et al.*, 371 U.S. 156 (1962); *United States* v. *Carlo Bianchi and Company*, 371 U.S. 939 (1963).

expeditious review and the position of the Commission has been quite uniformly upheld by the courts.

> "In seeking reviews of orders of general applicability the petitioners rely on the decisions in Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563, and United States v. Storer Broadcasting Co., 351 U.S. 192, 76 S. Ct. 763, 100 L. Ed. 1081, in which rules of general applicability affecting substantial rights were held reviewable under other statutes. The courts of appeals have not applied these decisions in determining rights to review under § 19(b). * * *."

Thus, "prematurity" was not the basis for the court's holding; to the contrary, the court adopted the Commission's erroneous views that "form of proceeding" controls reviewability.

4. Contrary to the Commission's claim, the basic question of direct reviewability of a substantive "general" order raised in this case has not "receded" and cannot "recede" in importance. The problem of inter-circuit conflicts inherent in the Commission's approach to direct review of substantive regulations is illustrated by the stated conflict in these cases with the decision by the Ninth Circuit in the *Superior* case. Any discussion of questions actually reached by the Tenth Circuit in No. 386, and any consideration of questions not properly reached by the Ninth Circuit in the *Superior* case, cannot avoid recognition of the intertwined nature of the issue of direct reviewability and the issue of substantive validity in No. 386. In addition, it is impossible to rationalize the Commission's claim that the direct review issue has "receded" in importance with the Commission's contentions in No.

386 that the order in question is of sweeping substantive effect, and that the Commission has unlimited powers under the Act to proceed with substantive decisions through the vehicles of "rule-making" proceedings and issuance of "general" orders.[2] In the face of these contentions, the question of direct reviewability of such substantive "general" orders is of an importance equal to that of substantive validity of the particular rule in question in No. 386. Certainly, the Tenth Circuit's difficulty with what that court described as the Commission's "bootstrap operation" underscores this importance of the reviewability issue. In addition, difficulties for litigants and the courts flowing from the Commission's position on reviewability have now been further revealed by questions as to issues not properly considered by the Ninth Circuit in the *Superior* case.[1] The broad issue of reviewability of substantive "general" orders therefore cannot disappear by a separate decision in No. 386 on validity of this particular rule, but will remain a question of controversy and confusion in the administration of this statute unless resolved in these cases.

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[2] The Commission's brief in opposition in No. 387 does not address itself to the Commission's obviously ambivalent position in No. 386, the Commission relies almost exclusively upon *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), to support its position on construction of the Natural Gas Act, but on the question of direct reviewability, the Commission has contended that the Communications Act and the Natural Gas Act are so dissimilar that tests of reviewability set forth in *Storer* cannot be applied under the Natural Gas Act. The fact is that the issue of reviewability ripe in No. 387 and the issue of substantive validity ripe in No. 386 are inseparable not only because of the nature of the proceeding below, but also because of this confusing, inconsistent treatment of *Storer* by the Commission.

5. Pan American agrees with the Commission that the issue of substantive validity of the particular rule in question is ripe for consideration by the Court in No. 386.[3] Beyond this, the arguments of all parties in Nos. 386 and 387 also lead to the conclusion that the Petition in No. 387 should be granted. Granting of the Petition in No. 387 will bring before this Court the principal cases and parties in the posture existing before the Tenth Circuit, the separate records in the principal cases decided together by that court, and the two major issues now ripe for review and of continuing importance and applicability in the administration of this regulatory statute. Rather than "complicating" consideration by this Court, granting of the Petition in No. 387 will provide the most logical, effective means for considering and deciding two inseparable, equally important questions affecting rule-making under the Natural Gas Act.

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[3] Pan American, of course, does not agree with the Commission's reading of cases relied upon by the Commission in its brief in opposition in No. 387, such as *Sun Oil Co.* v. *Federal Power Commission*, 304 F. 2d 293 (5th Cir. 1962), and cases cited in footnote 4 on page 8 of the Commission's brief. As indicated in the cases in which opinions were written, the courts obviously had first accepted the Commission's argument that the orders in question were "procedural" and that any substantive effect could be considered fully if and when such orders actually operated to deprive a company of specific rights. By contrast here, the Commission's pleadings in No. 386 in this Court fully reveal the true, immediate substantive effect, impact and nature of Order No. 242 and reveal that there is no basis for the Commission's argument that such a truly substantive order is not directly reviewable.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

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PETITION FOR REHEARING BY PETITIONER

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR REHEARING BY PETITIONER

Petitioner prays that this Court grant rehearing of its order of May 4, 1964, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case (No. 7002 below) as prayed for in the petition filed August 19, 1963, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. As set forth in the Petition, the issue in the instant case is whether orders of the Federal Power Commission promulgating "general" rules under the Natural Gas Act, 15 U.S.C. §§ 717-717w, are reviewable by "direct" petitions for review under Section 19(b) of that Act and upon the record in the Commission's rule-making proceeding. The Tenth Circuit held there can be no such "direct" review under this Act, and that the doctrine of "direct" review of agency rule-making orders set forth in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), is not applicable.

2. On April 20, 1964, in the companion case styled *Federal Power Commission* v. *Texaco Inc., et al.*, No. 386, This Term, this Court held that its holdings as to administrative agency rule-making hearing requirements set forth in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), *are* applicable to rule-making proceedings under the Natural Gas Act. In so doing, this Court reversed the decision of the Tenth Circuit in the companion case below (No. 7303). However, on May 4, 1964, this Court denied the Petition in the instant case, and thus left standing the holding below in the instant case which is inconsistent with the doctrine of "reviewability" of general rules set forth in *Storer*. Specifically, contrary to the holding below as to "reviewability," this Court held in *Storer* that "direct" review of an agency rule of substantive effect upon the "rule-making" record is appropriate, and as shown by the Petition in the instant case, there are no significant differences between the review pro-

visions of the Natural Gas Act here involved and the Communications Act before this Court in *Storer*.

3. The instant case thus is now vitally affected by this Court's decision of April 20, 1964, in the companion case No. 386, and by the forthcoming remand in No. 386. This Court in No. 386 left unresolved the issue of "reasonableness" of Commission rules in their application to specific types of contract clauses, which also has not yet been considered by the Tenth Circuit. As set forth in the "Petition for Rehearing by Respondent Pan American Petroleum Corporation" filed in No. 386, upon remand of No. 386 to the Tenth Circuit, this and other undecided issues should be considered and decided by the Tenth Circuit. However, resolution of such issues there inevitably will involve the question of what is the appropriate record for such review of the Commission's general orders, particularly when the issue of "reasonableness" is considered. Accordingly, Petitioner respectfully submits that prior to consideration of such issues by the Tenth Circuit or any other court,[1] this Court should resolve the issue of reviewability of a general order under Section 19(b) of the Natural Gas Act, and the issue of whether the proper vehicle for judicial review *is* the record developed by the Commission in its rule-making proceedings.

4. Unless the Petition in the instant case is granted, this Court's decision and forthcoming remand in No. 386 will leave constructions of the Natural Gas Act in most curious legal and practical anomolies—the *Storer*

[1] See "Motion of Texaco Inc. for Order Perfecting Proper Venue on Remand and Brief In Support of Motion" filed May 11, 1964, by Texaco Inc. in No. 386.

holdings are held applicable for one purpose and to one phase of "rule-making" in No. 386, but the decision below that the *Storer* holdings do not apply as to "reviewability" will be left standing in the instant case. Further, the critical importance of the "reviewability" issue is increased by the decision in No. 386 and current and future use by the Commission of rule-making procedures discussed therein. Upon remand in No. 386, and in the future, the reviewability and record issues in the instant case inevitably will arise again and again because the matters at issue in current Commission rule-making proceedings affect not only regulated entities, but all participants in such proceedings.

5. In the light of this Court's decision in No. 386, particularly the discussion of the *Storer* case therein, and the necessity for formulating an appropriate remand in No. 386, Petitioner therefore respectfully submits that the Court should reconsider its denial of the Petition in the instant case. Under *Storer*, "rules" of the Federal Communications Commission are directly reviewable on the record in the rule-making proceeding, and the same considerations apply to "rules" of the Interstate Commerce Commission (*American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298 (1953)). The reasons for availability of such direct review are equally applicable to Federal Power Commission proceedings under the Natural Gas Act, and the instant case provides the most appropriate vehicle for such a decision by this Court. Now, because of this Court's decision in No. 386, all pending and future proceedings involving "general" rules promulgated in administration of the Natural Gas Act are and will be affected by the reviewability issues ripe for decision in the instant case.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, Petitioner respectfully urges that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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May, 1964

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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